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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 04 2009

EAC 03 161 50136

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the director's decision. The Administrative Appeals Office (AAO) remanded the matter on procedural grounds. The director again denied the petition. The matter is now before the AAO on certification. The AAO will affirm the director's decision and the petition will be denied.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in business. The petitioner seeks employment as a co-publisher and co-editor of *Attawassul News*, an Arabic-language newspaper published in New York. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner has not established that he qualifies as an alien of exceptional ability in business, or that an exemption from the requirement of a job offer would be in the national interest of the United States.

In the March 13, 2009 notice of certification, the director allowed the petitioner 30 days in which to submit a response, pursuant to the regulation at 8 C.F.R. § 103.4(a)(2). Allowing an additional three days to account for service by mail, pursuant to 8 C.F.R. § 103.5a(b), the petitioner's response period elapsed on April 15, 2009. That date has passed, and the AAO has received no response from the petitioner. Accordingly, the AAO will render its decision based upon the record as it now stands.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The first issue to be decided here is whether the petitioner qualifies for classification as an alien of exceptional ability in business. The regulation at 8 C.F.R. § 204.5(k)(3) states, in part:

(ii) To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

(iii) If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

Counsel asserted that the six listed regulatory criteria "do not readily apply to [the petitioner's] request for a national interest waiver." We note that the criteria pertain to the exceptional ability classification, rather than to the waiver. Counsel asserted that the petitioner's "occupation as defined in this petition does not lend itself to the measurements of excellence articulated in the list above. In particular, [the petitioner's] occupation as co-editor, co-publisher of an Arab-language newspaper does not involve use of specialized skill." According to counsel, what sets the petitioner apart is not his skill as an editor as such, but his "spirit of entrepreneurship." The assertion that editing a newspaper "does not involve use of specialized skill" is far from self-evident, and counsel provided no evidence to support this claim. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, according to the Department of Labor's Occupational Information Network, the occupation of "editor" requires "Considerable Preparation," including "Several years of work-related experience" and, in most cases, a college degree. *See* http://online.onetcenter.org/link/summary/27-3041.00 (visited April 21, 2009; copy incorporated into record of proceeding).

The AAO takes notice that counsel did not claim that the regulatory standards do not readily apply to the petitioner's occupation, i.e., newspaper editor/publisher. Rather, counsel claimed that the petitioner stands out as an "entrepreneur," and that the exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii) do not apply do entrepreneurs. We do not find this argument persuasive. "Entrepreneur" is not a distinct occupation in its own right, any more than "employee" is a specific occupation. The petitioner is a newspaper publisher and editor, and as such it is proper to compare him to other newspaper publishers and editors, rather than assert, as counsel has done, that the petitioner is an "entrepreneurial publisher" who cannot be judged by the regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii).

Even if we were to accept that there is a distinct occupation called "entrepreneurial publisher" to which the regulatory criteria do not apply, 8 C.F.R. § 204.5(k)(3)(iii) requires the petitioner to submit comparable evidence to establish eligibility. It cannot suffice to argue that the petitioner "relies on the totality of his skills, training, education, knowledge and innate abilities."

Furthermore, it is certainly possible to compare the accomplishments of one entrepreneur against those of other entrepreneurs. Some of the regulatory standards, such as compensation and length of experience, are absolute and easily documented through objective evidence.

We will, therefore, consider the six criteria at 8 C.F.R. § 204.5(k)(3)(ii) and weigh the petitioner according to those standards. In doing so, we note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below. Qualifications possessed by all or most workers in a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." For example, every qualified physician has a college degree and a license or certification, but it defies logic to claim that every physician therefore shows "exceptional" traits.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(A)

A number of universities offer degree programs in journalism and related fields. Therefore, this criterion is applicable to the occupation of an editor/publisher.

Counsel stated:

> [The petitioner] received a Bachelors [*sic*] of Arts in economics and applied mathematics from Queens College of the City University of New York in February 2003. He is due to receive a Masters [sic] of Arts in economics from Hunter College of the City University of New York in June 2006, and a Juris Doctorate from Fordham University School of Law in May 2006.

The petitioner held only one of the above degrees at the time he filed the petition on May 1, 2003. The beneficiary of an employment-based immigrant petition must be eligible at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Degrees that the petitioner received subsequently cannot retroactively contribute toward a finding of eligibility. Even then, the petitioner does not hold any degree in journalism. The petitioner's degree in economics and applied mathematics does not relate to the area in which the petitioner claims exceptional ability. For the above reasons, the petitioner has not satisfied this criterion.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

Because it is possible to accumulate more than ten years of experience as an editor and/or publisher, this criterion applies to the petitioner's intended occupation.

The petitioner has not shown that he had at least ten years of full-time experience as a publisher and/or editor as of the May 2003 filing date. We note that the petitioner was not yet 22 years old when he filed the petition, meaning that he would have had to have begun an uninterrupted career in publishing at the age of eleven in order to satisfy this criterion. The record does not indicate that the petitioner had any newspaper experience prior to working on his college paper beginning in 1999, and counsel concedes that the petitioner's "work on Attawassul News . . . has always been part-time." There is no indication that the petitioner has ever worked full-time in publishing. The petitioner has not satisfied the criterion relating to full-time experience in the occupation.

> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C)

This criterion does not appear to apply to the petitioner's occupation. The petitioner has not identified anything comparable to licensure or certification relating to his occupation.

> *Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(D)

Because editors and publishers are routinely compensated for their work, and there is no evidence that such compensation is rigidly fixed by factors unrelated to ability, this criterion appears to apply to editors and publishers.

The record does not indicate that the petitioner has ever drawn any compensation from his work as editor and publisher of *Attawassul News*, or that he has been a paid editor/publisher of any other newspaper. The petitioner has not satisfied this criterion by showing that he has received remuneration at a level that demonstrates exceptional ability.

> *Evidence of membership in professional associations.* 8 C.F.R. § 204.5(k)(3)(ii)(E)

The petitioner claims no membership in any professional association relating to journalism or publishing.

> *Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.* 8 C.F.R. § 204.5(k)(3)(ii)(F)

There exist numerous forms of recognition for achievements and significant contributions in the field of journalism. One example that comes readily to mind is the Pulitzer Prize, although one would not need to receive an award of such stature to meet this regulatory criterion. We cite this example only to show that this regulatory criterion is clearly applicable to the petitioner's occupation. The record contains no evidence that the petitioner has received recognition to satisfy this criterion.

In a request for evidence dated November 3, 2005, the director gave the petitioner another opportunity to submit qualifying evidence of exceptional ability. In that notice, the director quoted extensively from the regulatory language, to leave no doubt as to the type and caliber of evidence required. The director noted that, if the petitioner sought to use alternative evidence, the petitioner "should also explain in detail why the nature of [the petitioner's] work makes it impossible for [him] to satisfy at least three of the six criteria."

In correspondence dated January 27, 2006, counsel stated that the petitioner "has made no claim to 'expertise significantly above that ordinarily encountered in the field of newspaper publishing.'" Because the petitioner is a newspaper publisher who seeks classification as an alien of exceptional ability in his field, he must, by definition, establish expertise significantly above that ordinarily encountered in the field of newspaper publishing. We do not accept counsel's attempt to sidestep the plain language of the regulations by asserting that the petitioner's "life experience, as a whole" is evidence of his exceptional ability. The above-cited regulations define "exceptional ability" and provide guidelines to demonstrate it. The specific evidentiary guidelines can, under certain circumstances, be set aside and replaced with comparable evidence, but there can be no such substitution of the regulatory definition of "exceptional ability." By refusing to produce evidence in compliance with the regulations quoted above, the petitioner has essentially forfeited his claim of exceptional ability.

In the certified decision issued on March 13, 2009, the director found that the petitioner had not submitted evidence to satisfy any of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii). The director also found that the petitioner had not persuasively established those criteria do not readily apply to the field of newspaper publishing, or that the petitioner's "life experience" is self-evident proof of exceptional ability. The record contains no rebuttal to the director's findings.

For reasons explained above, the AAO affirms the director's finding that the petitioner has not established that he qualifies as an alien of exceptional ability in business.

The second issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. The petitioner cannot qualify for the waiver if he does not also qualify for the underlying immigrant classification, but we will consider the waiver claim here in the interest of thoroughness.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989). Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, an alien cannot qualify for a waiver simply by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

In its July 8, 2005 remand order, the AAO summarized the early stages of the proceeding and explained what further action would be necessary:

> In discussing the first prong of the national interest test set forth in *Matter of New York State Dept. of Transportation*, the director stated: "The beneficiary is a second year law student at Fordham University. The beneficiary's field of endeavor is of substantial intrinsic merit." The record, as a whole, does not clearly identify the petitioner's prospective field of endeavor. While the petitioner is a law student, the petitioner's arguments revolve around his involvement as a newspaper editor and publisher. Furthermore . . . the petitioner was not even notified of his acceptance into law school until more than a month after the petition's filing date. If the petitioner desires that the director take into account the petitioner's legal education, and his activities while studying law, then the proper course of action would be for him to file a new petition with a later filing date that would permit consideration of that information.
>
> The petitioner has asserted that his newspaper serves the national interest by serving as a voice of moderation within the Arab community in New York. The director, in discussing this newspaper, described the newspaper but did not explain why these attributes disqualified, or failed to qualify, the petitioner for a waiver. A discussion of "citations" appears to be more germane to the work of scientific researchers than to newspaper publishers.
>
> The petitioner contends that that moderate Arab voices must be heard, and this point is well taken, but it does not follow that publishing a moderate Arabic newspaper automatically qualifies the publisher/editor for a national interest waiver. The director should afford the petitioner the opportunity to demonstrate that his newspaper has shaped the debate about Arab-Western relations, and the role of Arabs in American society, beyond the local level. General arguments about the importance of the media or specialty publications cannot suffice, because Congress has established no blanket waiver for publishers or editors of such publications.

Following the AAO's remand order, the director issued a request for evidence on November 3, 2005, in which the director instructed the petitioner to establish that *Attawassul News* has influenced Arab-Western relations at a national level. The director observed that the petitioner appeared to be a full-time law student who has never held a paid position in the newspaper industry, and that further evidence would be necessary to establish the exact nature of the petitioner's intended future work.

In response, counsel stated that the petitioner "has never made the claim that the newspaper had achieved great success or substantial distribution. Rather, he indicated that the existence of the newspaper itself was inherently important." The importance of "the existence of the newspaper itself" speaks to the intrinsic merit of the petitioner's occupation as an editor/publisher, but it does not establish national scope or a track record of benefit to the United States. Counsel effectively acknowledged the

limited distribution of the newspaper, but failed to explain how the petitioner's work with this local newspaper is national in scope as required in *Matter of New York State Dept. of Transportation* at 217.

Counsel acknowledged that the petitioner and his father, the newspaper's co-publisher, "do not currently have the resources to expand Attawassul News at this point," but counsel contended that the petitioner, "through his legal studies and community involvement has sought a variety of ways to further this goal." As the AAO has previously observed, the petitioner's legal studies did not begin until after the petition was filed. Furthermore, this argument does not indicate that the petitioner has a track record of achievement in terms of influencing Arab-Western relations. Rather, it acknowledges that the petitioner's work has had little influence to date, but that the petitioner hopes to have more influence and impact in the future. Speculation and conjecture of this kind cannot form a sufficient foundation for a national interest waiver, even if the petitioner had shown (which he has not done) that "legal studies" somehow increase the circulation or influence of a small newspaper.

When the director issued the certified denial on March 13, 2009, the director stated that the petitioner had not established that the petitioner's work with *Attawassul News* has had national scope or a history of demonstrable impact or influence in the field. The director noted that other publications geared toward Arab-Americans have substantially greater circulation and visibility. As noted above, the record contains no response from the petitioner or counsel to contest or rebut the director's findings.

The AAO acknowledges that the director went outside the record when providing circulation data for other Arab-American publications. This information was provided simply to illustrate a point, however; it was not derogatory evidence that directly led to the denial of the petition. The AAO affirms the director's finding that the petitioner has not established eligibility for the national interest waiver.

Improving communication and understanding between the Arab community and others in the United States is certainly a laudable and worthwhile goal. At the same time, however, not every alien working toward that goal automatically qualifies for the special benefit of a national interest waiver. The petitioner's demonstrated impact to date has been minimal; it cannot suffice for the petitioner to assert that the petitioner is so talented and motivated that it is only a matter of time before he eventually becomes an important figure in his field.

On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The AAO will affirm the denial of the petition for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision of March 13, 2009 is affirmed. The petition is denied.